United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

Nos. 74-1584, 74-1636

In the

United States Court of Appeals

For the Second Circuit

SCIENTIFIC HOLDING COMPANY, LTD, AN ILLINOIS CORPORATION,

Plaintiff-Appellant,

vs.

PLESSEY INCORPORATED, A DELAWARE CORPORATION,

Defendant-Appellee.

REPLY BRIEF FOR APPELLANT, SCIENTIFIC HOLDING COMPANY, LTD.

FRANCIS J. MCCONNELL,
RICHARD P. CAMPBELL,
135 South LaSalle Street,
Chicago, Illinois 60603,

ROBERT M. BLUM,
230 Park Avenue,
New York, New York 10017,

Attorneys for Plaintiff-Appellant, Scientific Holding Company, Ltd.

Gunthorp-Warren Printing Company, Chicago • 346-1717

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I.

THERE WAS SUBSTANTIAL CONFLICTING EVIDENCE AS TO THE VALIDITY OF THE MARCH 2 AMENDMENT AND JUDGE BONSAL ERRED IN WITHDRAWING THE ISSUE FROM THE JURY.

A. The Evidence Supported ISL's Claim That the Amendment Lacked Consideration (Reply to Def's. Br. pp. 17-28).

At the outset, it is extraordinarily instructive to examine Plessey's approach to ISL's argument that the trial court erred in taking the issue of the validity of the March 2 amendment

from the jury because there was substantial conflicting evidence presented on that issue. Plessey's brief devotes 12 pages to a discussion of the lack of consideration issue and yet only one-half of one page, 18 lines, involves a contention that Judge Bonsal was correct as a matter of law in directing the verdict. The entire balance of the argument consists of an elaborate attempt to restructure the facts and characterize those facts as "undisputed" (Def's. Br. p. 18). Plessey's devotion of over 95% of its argument to the fact issues is the most convincing demonstration possible that in this three-week trial plaintiff did indeed produce evidence which should have entitled it to get to the jury.

In its first legal argument Plessey contends that even though the March 2 amendment was void for want of consideration as a matter of common law, nevertheless New York General Obligations Law, Section 5-1103, saves them. The complete answer to this argument is that the amendment was negotiated, written and was to be performed in Barbados. Barbados law therefore applies. Dicey & Morris, *The Conflict Of Laws* (8th ed.) p. 742; 8 N. Y. Jur., *Conflict Of Laws,* § 16, p. 433. The fact that the contract provides that New York law shall apply generally is irrelevant. The issue here is whether the amendment is properly part of the contract at all and that issue should be resolved by reference to the place where the amendment was entered into and was to be performed—Barbados. Plessey does not contend that there is in Barbados a statute similar to the New York statute, and Barbadian common law is simply English common law, which of course, is the very source of the past consideration rule. *Wood* v. *Benson* (1831), 1 L.J. Ex. 18, 2 Cr. & J. 94.

In addition, by its terms the New York statute in inapplicable. First, § 5-1103 is effecive only if the modification is signed by the party against whom it is sought to be enforced. Kovar, of course, had no authority from the ISL board to sign and his signature was obtained by coercion. Moreover, § 5-1111 specifically provides with reference to § 5-1103 as follows:

> § 5-1111. Execution By Agent In Real Property Transactions; Written Authorities Required.
>
> If executed by an agent, any agreement, promise, undertaking, assignment or offer required by Section 5-1103 . . . to be in writing, which effects or relates to real property . . . shall be void unless such agent was thereunto authorized in writing.

Here, Kovar clearly was not authorized in writing to execute the amendment and Plessey presented no evidence that he was so authorized. As a result, § 5-1103 is inapplicable.

Second, Plessey seeks cursorily to rely on the proposition that failure of consideration may not be raised as a defense to an executed contract. That rule has no applicability to the facts here because the promise made by ISL, which was unsupported by consideration passing from Plessey, was never executed. The rule relied on by Plessey applies only when the promise made without supporting consideration from the other party requires execution; that is, when the promise requires some affirmative act in addition to merely making the promise. When the promiser undertakes the further act, the "execution", he confirms and validates the promise. Thus it is the further act which waives the missing consideration. There was such a further affirmative act which constituted "execution" of the promise in each of the decisions relied upon by defendant. Here, of course, by reason of the nature of ISL's promise, no further act was required of it. ISL promised to agree to an amendment shortening the takeover period by 30 days. That promise was unsupported by consideration passing from Plessey and was coerced (Pl's. Br. pp. 13-25). In addition, once having made the promise, ISL did nothing and was required to do nothing further. It simply continued to perform precisely as it would have had the promise never been made. Thus ISL never "executed" the promise and the rule and decisions relied upon by Plessey are inapposite.

As mentioned earlier, Plessey devotes the remainder of its consideration argument to an attempt to establish that ISL's evidence should be entirely disregarded and that, therefore, the facts are undisputed. The attempt fails miserably as it must. Furthermore, the citation of the obvious rules of law at page 20-22 of Plessey's brief are irrelevant because they assume that the facts are "undisputed" as claimed by Plessey. The essence of this appeal is that the facts were vigorously disputed. The jury should have been permitted to determine whether Plessey's performance was excused by ISL's breach as Plessey asserted, or whether ISL was not in breach of the agreement and therefore Plessey was without right to refuse to close.

Plessey's factual answer to ISL's lack of consideration argument reduces to the contention that Plessey was entitled to refuse to close because ISL was allegedly in breach of certain written and oral representations. The existence of a breach was clearly a jury question.

With respect to the alleged breach concerning normal operating losses, paragraph 10(e)(i) of the contract provided:

> "since December 31, 1969 there has not been: (1) any change in ISL's financial condition, assets, liabilities or business other than changes in the ordinary course of business. . . . *Operating losses* not at a rate in excess of twenty thousand ($20,000) U. S. dollars per month for the period from December 31, 1969 to the closing hereof shall not constitute an out of the ordinary change of ISL's condition" (Emphasis supplied).

The evidence offered by plaintiff supported the conclusion that at the closing no claim was ever made that ISL was in breach of this provision but that, in fact, that claim was asserted for the first time by Plessey's attorney after the filing of this action. At the closing, Plessey's claim was limited to the contention that because ISL had lost approximately $200,000 more than anticipated for the calendar year 1969, it would be necessary for Plessey to invest $800,000 of new capital rather than

$600,000, and, further, that ISL should be charged with the cost (at 10%) of this additional money (Tr. pp. 1356, 1606-7).

As to the amendment shortening the management period by 30 days, Plessey's claimed justification was that ISL was in effect receiving a free month because the closing was not taking place until March 2, even though the February 4 contract showed March 2 as the closing date. Thus Kovar testified (Tr. pp. 137-8):

> "Q. Now, was there some further [in addition to the $200,000] change in the purchase agreement?
>
> A. Yes. When that matter was resolved, Mr. Albert said there was one other point that he wanted Mr. Dubin to explain and Mr. Dubin said that they wanted to reduce the period of time in which we had to reach minimum earnings. The contract, as I understood it, that we had signed on February 4 provided for ISL, the present management of ISL, to reach an average of $15,000 per month in the months of June and July; June being the third month, commencing with the third month we were supposed to start averaging $15,000 a month.
>
> Mr. Dubin wanted that period reduced to start in May rather than in June.
>
> I asked him why as to that and he stated that they had not really considered the fact that the March 2 signing, closing, would give us an additional month because the measuring year started the first full month after the closing and the effect of a March 2 date would make the measuring year start April 1 and, in effect, would give us a free month of March to start to fill up the pipeline of material and get things moving again."

Similarly, Lewis testified (Tr. pp. 565, 567):

> "Q. Well, was there any discussion as to whether or not ISL was in compliance with paragraph 10-E of the agreement?
>
> A. No claim was made that it wasn't."
>
> * * * * *
>
> "Q. And what reason was given for the amendment shortening the management provision?

A. Basically, that everyone had expected that the transaction would close in February, that for whatever reasons it had been delayed a few days until March. I think that really was the reason."

On the basis of the foregoing testimony, the jury, if permitted to decide the issue, could have found that Plessey did not either consider nor assert that the $74,000 loss incurred for the months of January and February constituted "an out of ordinary change in ISL's condition", and that this claim was an after the fact litigating position adopted by Plessey's attorneys in an attempt to justify the eleventh hour amendments extorted by Plessey.

In any event, it is clear that ISL was not in material breach of the representations and warranties contained in paragraph 10(e)(i) and the jury should have been permitted to so find. Examination of DX R, the ISL February financial, discloses that included in the two-month $74,000 figure was $19,000 of legal and audit fees incurred in connection with the acquisition and bank interest of $17,000 both of which Plessey had agreed to absorb (PX 3, par. 2; Tr. pp. 281-3). These amounts were obviously not "operating" expenses. Indeed, Kovar testified that the expenses were "not applicable to the earn-out and not, in my opinion, applicable to any operating statement" (Tr. p. 340). Instead, the expenses were below the line, extraordinary items just as was the $26,000 gain on the sale of the villa. Thus, Kovar testified (Tr. p. 341):

"Q. That [the sale of the villa] was the sale of a fixed asset?

A. Yes Sir.

Q. This is an extraordinary item, isn't it?

A. Yes, just like legal expenses and just like special bank charges are."

It is thus clear that Plessey's contention that plaintiff "offered no evidence at trial as to whether these items . . . were of an extraordinary nature" (Br. p. 24) is false.

Plessey's remaining factual contention, that the February, 1969 financial was not available at the closing and thus Albert did not know the \$74,000 loss included \$36,000 of non-operating expenses, is similarly meritless. Albert was Plessey's chief accountant and was given full access to all raw financial data at the closing (Tr. p. 1573). Moreover, Plessey does not deny that the \$36,000 was, in fact, an extraordinary non-operating expense. It merely now states that it was not aware of that fact at the closing and therefore had a right to assume ISL had breached the condition, even though subsequent events established there was no breach. To state the argument is to refute it. There was ample evidence from which the jury should have been permitted to find that ISL did not breach the losses condition.

Plessey next argues that ISL was in breach of alleged *oral* representations that 1969 losses would not exceed \$200,000. The short answer is that the February 4 contract, which incorporated the entire understanding of the parties, contains no representation whatsoever limiting the amount of 1969 losses (Pl's. Br. pp. 14-15). The fact that ISL lost more money than Plessey anticipated, or than Hourihan allegedly projected, provides no basis for Plessey's refusing to close or renegotiating the deal. 1969 losses were not a condition of the contract and that representation cannot be supplied by reference to an alleged conversation occurring two months *prior* to the contract date. *Farmer* v. *Arabian American Oil Co.*, 277 F.2d 46 (2nd Cir., 1960), the decision relied upon by Plessey, explicitly holds that a contract which is intended as the complete integration of the parties' understanding may not be varied by parol evidence. Plessey's implicit suggestion that this elaborate contract did not embody the parties' complete understanding is ridiculous.

The contract did call for ISL to furnish, upon execution, a profit and loss statement and balance sheet for 1969 which would have disclosed the amount of the 1969 loss. This balance sheet was not completed on February 4 and Plessey chose to

waive the requirement. It did so because it had already made its own independent investigation of ISL's financial condition, knew exactly how desperate it was, but nevertheless believed the acquisition to be more favorable than originally envisaged. Plessey was not buying ISL's balance sheet. As Plessey's counsel admits, the company was insolvent and Plessey's interest was in ISL's customers and order backlog, and the time which could be saved in entering the U. S. market (Br. p. 5).

Further with respect to ISL's 1969 losses, attached to PX 111, Clarke and Crocker's February 25 report, was a statement disclosing the actual amount of the 1969 loss ($395,000). This report was issued a week before the closing. It serves Plessey nothing to point to Albert's and Sinsheimer's testimony that they did not receive copies of this report until after the closing, or to argue that Clarke and Crocker did not appreciate the significance of the loss figure shown. Had the lack of consideration issue gone to the jury, plaintiff's counsel would have argued that such testimony was inherently unbelievable since both Albert and Sinsheimer were shown on the distribution list, were intimately involved in the acquisition, and the purpose of Clarke's and Crocker's trip was to report to them and the Plessey Board on ISL's financial condition. In fact, when plaintiff's counsel attempted to make this argument, Mr. Maloney, Plessey's attorney, objected on the ground the validity of the March 2 amendment was not before the jury (Tr. p. 1742). In short, simply because Sinsheimer and Albert denied having read the report prepared at their direction and for their use hardly forecloses the jury from finding they did in fact know of its contents. It was for the jury to make this determination, and if the jury saw fit to disbelieve this testimony they could also have rejected other similar self-serving statements of defendants' officers.

Further, if the claimed need for investing $800,000 rather than $600,000 was the $200,000 greater than anticipated 1969 loss, than Frye, who was Plessey's chief financial officer and

Albert's superior, must have known of this when he reported to the Plessey Board on February 27 that (PX 110):

> "The prospects for Barbados were better than originally envisaged but it had been necessary to make the following changes in the proposals previously approved by the Board.
>
> (i) the working capital to be immediately provided was now likely to be in the region of $800,000."*

There is simply no way to reconcile PX 111 and PX 110 with Albert's testimony that he learned for the first time at the closing of the 1969 loss. The jury properly could have reflected Albert's testimony as unbelievable and determined that Albert's conduct at the March 2 closing in demanding the disputed amendments on the basis of claimed last minute financial bad news was nothing but a charade.

Finally, Albert was hoist by his own petard. By his own explanation of how he arrived at the amount of new capital which it was necessary to invest, he admitted that in fact Plessey was furnishing no additional consideration beyond that which it was already obligated to furnish under the contract. Albert admitted that in arriving at the $800,000, he included the $180,000 downpayment of ISL shareholders and that therefore Plessey was only furnishing $600,000 of new capital to ISL. That, of course, was the amount it had agreed to furnish under the February 4 agreement (PX 3, par. 5(a)) (Tr. p. 1602):

> "Q. So if we subtracted that $180,000 [the downpayment to ISL owners] from your calculation as to what was necessary as of March 2 when you got, according to

---

* Plessey's contention that their officers' knowledge of the actual loss prior to closing is irrelevant because it had already been induced to enter into the February 4 contract is mistaken. If Plessey knew of the actual loss before closing and its board nevertheless determined to close, than there was no reliance and a waiver of any misrepresentation of the loss amount and the refusal to close in order to extort the amendment was a sham. Of course, in fact there was no representation at all. (Supra., p. 7).

your testimony, the final figures for the year 1969, only the $600,000 would be required? Isn't that right?

A. That is true."

Accordingly, even if there had been a misrepresentation as to the amount of 1969 losses, by Albert's own calculation it was not material and Plessey was supplying no new consideration because Plessey was only investing what it was already obligated to invest. Albert's admission completely destroyed Plessey's consideration argument.

B. There Was Substantial Evidence from Which the Jury Could Have Found That Kovar Lacked Authority to Agree to the Amendment (Reply to Def's. Br. pp. 29-40).

Plessey argues that the opinion letter of ISL counsel delivered at the closing "establishes Kovar's authority as a matter of law." Of course, it does no such thing. Lewis, ISL's attorney who signed the letter and who was present at the closing, testified that the opinion letter was prepared in Chicago in February prior to the closing and referred only to the February 4 contract (Tr. 612). Lewis had no way of knowing in advance that on the last day of the closing Plessey would insist upon amending the contract. Moreover, Plessey had no right to rely on the opinion letter as proof of Kovar's authority to agree to the amendment. Kovar and Lewis both testified that Kovar specifically warned Plessey that he lacked authority to amend the contract (Tr. pp. 137, 349-55, 578). When after this warning, Plessey nevertheless accepted the opinion letter as fulfillment of the condition set out in paragraph 13 of the agreement, they waived any alleged breach of the condition. Indeed, Judge Bonsal pointed this possibility out during Lewis' cross-examination (Tr. p. 589).

Finally, the contention that the ISL Board on January 30 specifically authorized Kovar to agree to amendments which no one knew of until March 2 is absurd. Lewis was directed

to deliver an opinion letter with respect to the February 4 agreement, nothing more. In light of Kovar's disclaimer of authority at the closing, Plessey relied upon the previously prepared opinion letter to support the last minute amendment at its own risk.

The contention made at pages 31-32 of Plessey's brief that there was no credible evidence demonstrating Kovar's lack of authority is simple nonsense. That evidence is discussed fully at pages 9-12 of plaintiff's principal brief. The alleged conflicts in testimony relied upon by Plessey should properly have been for the jury. Similarly, whether or not Plessey was put on notice as to Kovar's lack of authority by the ISL Board minutes and Proxy material was clearly a jury question. The court erred in refusing to allow the jury to decide these issues.

Finally, Plessey seeks to sustain the March 2 amendment by arguing that even though Kovar was not authorized, the ISL board ratified his action by its silence. This contention turns entirely on disputed questions of fact as to when the ISL Board first learned of the amendment and whether they then acted seasonably to put Plessey on notice. Plessey devotes six pages of its brief to argument of these fact questions. No amount of argument, however, will alter the reality that ISL presented evidence from which the jury could have found that the ISL Board acted with dispatch to inform Plessey that they regarded the takeover as wrongful. The testimony at trial established that Raymond Carlen, a director of ISL, was not aware of the amendment until June 9, 1970 when Kovar first told him of it (Tr. p. 423). On June 11 he received Sinsheimer's letter notifying him that pursuant to the amendment Plessey was taking over management of ISL. Carlen then immediately wrote Sinsheimer protesting the takeover and stating: "the Directors will look to Plessey Incorporated as trustee of the rights of Scientific Holding Co. . . ." (PX 27). Carlen further requested a meeting with Sinsheimer. Sinsheimer's return letter stated Plessey had the right to assume control of ISL pursuant to the March 2 amendment and that he saw no need for a meeting (PX 28).

Carlen perservered. Eventually a meeting was arranged for July 13. At that meeting, attended by Carlen and ISL's attorney, Shapiro, Carlen told Sinsheimer that the March 2 amendment was unauthorized because Kovar lacked authority and that the assumption of management by Plessey imposed upon Plessey a trusteeship with respect to profit maximization (PX 31, DX AT; Tr. pp. 430, 512, 515). This conversation was reported to the shareholders in a letter from Carlen dated August 11 (PX 31, DX AT).

It is thus clear that evidence was presented from which the jury could have concluded that Kovar's unauthorized agreement to the amendment was explicitly repudiated and that Plessey's contention that it was ratified by silence was unsupported by fact. Carlen did all that was required of him to put Plessey on notice that it had assumed control wrongfully. In this regard it is important to understand that the duress operating on Kovar at the closing still existed to dictate the Board's actions when they learned of the unauthorized amendment. Plessey had the company. The only hope at that point was that Plessey would act in good faith and attempt to achieve maximization of profits (Tr. p. 613). Any attempt by ISL management to regain control would avail them nothing (Tr. p. 594). By the time legal proceedings were concluded, ISL would be a bankrupt, worthless shell. The directors had no choice but to protest the wrongful takeover for the record and trust in Plessey.

Finally, Plessey is estopped to rely on ratification by silence or acquiescense because at the July 13 meeting Sinsheimer told Carlen and Shapiro that ISL would easily earn the $360,000 profit, indeed would double that or better, and that therefore Carlen need not be concerned about the takeover (Tr. pp. 431, 623). On the basis of Sinsheimer's assurance it was decided that no further action should be taken. Hence, to the extent there was acquiescence to the Plessey takeover, it was induced by Sinsheimer's representations.

C. The Evidence Supported ISL's Claim of Coercion (Reply to Def's. Br. pp. 40-47).

Plessey first argues that as a matter of law it could not be found guilty of economic coercion because it was entitled to refuse to close and that therefore plaintiff was not threatened with a breach of contract (Br. p. 41). This, of course, begs the question as to whether plaintiff was in breach of any representations on its part justifying Plessey's refusal to close. If it wasn't, and this was for the jury to decide, then clearly Plessey was not entitled to demand the March 2 amendments and its threat to walk out on the deal constituted duress.

Plessey next makes a fact argument that its conduct throughout the negotiations and at the closing was fair and not overreaching. It doesn't dispute the fact that it held ISL in a "death grip" or the fact that Kovar had no viable alternative but to accede to the amendments as both he and Lewis testified. Failure to close would have resulted in a loss of the principal investors' stock to Data 100, and certain bankruptcy for ISL. Rather, Plessey argues that it knew of these facts but leaned over backwards not to take unfair advantage and to enable ISL to stay afloat until the closing. This, of course, is nothing but a jury argument and we repeat it was for the jury to assess the totality of this evidence.

However, contrary to Plessey's assertion, Plessey was not ISL's last hope. Kovar testified that ISL was in continuous negotiations with other potential acquirers, that Sinsheimer knew this, and that it was only after Plessey's oral proposal in early January that it was decided to terminate these discussions and accept Plessey's proposal (Tr. p. 735). ISL obviously still had bargaining leverage when it negotiated the February 4 agreement and had it known then how well it fit with Plessey's plans, it undoubtedly could have bargained more favorable terms. Plessey obviously did not want to agree to any kind of

management provision and its partial concession on this point was not an act of charity, but was the result of its knowledge that it had to agree to this provision, at least on paper, to make the deal. Nor was Plessey's purchase of the villa done out of the goodness of its corporate heart. ISL had an offer for the villa at the price Plessey paid and even if it hadn't, it was to Plessey's interest to assist ISL in meeting its payroll until closing because a bankrupt ISL was of no value to it.

By the time of the closing some 30 days later, however, everyone knew ISL was down to its last penny and it was too late to turn elsewhere or seek further forebearance by Data 100. It was in these circumstances that Plessey made its eleventh hour demands on threat of refusing to close. Clearly there was substantial evidence from which the jury, as exclusive trier of facts, could have found Plessey's conduct constituted economic duress invalidating the March 2 amendments.

The argument made by Plessey that ISL waived the coercion claim is unfounded. As discussed both in plaintiff's principal brief (p. 12) and this brief (supra, p. 11), immediately upon learning of the amendment, the ISL Board placed Plessey on notice that the takeover was deemed wrongful. In addition, testimony was presented explaining why ISL determined that the contract could not be reputiated, but that Plessey would be notified that it would be looked to as a trustee of ISL's rights (Tr. p. 613). The economic pressure was not, as Plessey assumes, removed after the amendment was signed (Supra., p. 12). There was thus no waiver of the coercion claim.

D. Withdrawal of the Issue of the Validity of the Amendment from the Jury Adversely Effected the Balance of Plaintiff's Case (Reply to Def's. Br. pp. 48-50).

Plaintiff does not contend, as Plessey would have it, that Judge Bonsal erred in the manner in which he directed the verdict or communicated that direction to the jury. Plaintiff's

point is, quite simply, that the effect of directing the verdict on this one issue carried over to the issues which the jury was permitted to decide. Much of plaintiff's case rested on the invalidity of the March 2 amendment and proof of that invalidity, in turn, rested upon the credibility of ISL's witnesses as compared to that of Plessey's witnesses. As the briefs here demonstrate, much of the testimony with respect to the same conversation or event was directly conflicting. When the jury was told that plaintiff's claim that the amendment was invalid had been rejected by the Judge, it is unrealistic to assume that they would not infer that a determination as to the relative credibility of witnesses had been made. If so, plaintiff was prejudiced with respect to the balance of its case.

II.

THE EVIDENCE ADMITTED OF NO CONCLUSION BUT THAT PLESSEY'S TAKEOVER WAS PREMATURE (Reply to Def's. Br. pp. 51-63).

Plessey attacks plaintiff's contention that the June takeover was premature by insisting that the parties "bargained for and agreed to a very specific use of the word 'average' " in the contract (Br. p. 56). From this totally unsupported premise, Plessey concludes that since the testimony "concerning the intent underlying the language" was irreconcilable and the jury found for Plessey, therefore the verdict must stand. The answer to this argument is, of course, that the meaning of a perfectly common, everyday word may not be altered by testimony to the effect that the word was assigned some meaning theretofore unknown to mankind. Plain and unambiguous contract language should be understood to mean what it clearly expresses. While the intention of the parties is important, it is not what hidden intention may have existed in the minds of one of the parties that is relevant, but what intention is expressed by the language employed. 4 *Williston on Contracts* § 609 (3rd Ed., 1961). Plaintiff's testimony, without contradiction, supports the only

permissible construction that the word "average" was employed to express the universally accepted meaning of the word. Thus, the intention expressed by the language was that ISL was to be afforded at least a two-month period to average profits of $15,000.

Plessey's attempts to assign the word "average" "a very specific use" were inherently incredible (See Pl's. Br. pp. 32-34). Moreover, as discussed in plaintiff's principal brief (p. 35), Plessey's construction renders meaningless certain of the language employed. The footnoted example relied upon by Plessey at page 57 of its brief does not answer plaintiff's contention at all. The fact remains that after the amendment, acceptance of Plessey's construction would result in one portion of the language permitting losses in May and another portion requiring $15,000 profits. Plessey's footnote does not address itself to this difficulty because it does not mention losses in May.

It is clear from the foregoing that the jury could not have acted reasonably in finding for Plessey on the "averaging" issue. Plaintiff is entitled to a new trial.

III.

PLESSEY'S DISCONTINUANCE OF THE CABLE HARNESS BUSINESS WAS A BREACH OF THE CONTRACT (Reply to Def's. Br. pp. 64-70).

Plessey does not even attempt to answer the thrust of plaintiff's argument regarding discontinuance of the cable harness business. As is discussed fully in our principal brief (pp. 36-38), the contract itself specifically provided that among the important assets of the business which Plessey was obligated to operate in good faith in the event of a takeover was cable harness assembly. That language was included at ISL's insistence in the final draft of the contract. Cable harness was regarded by ISL as a significant portion of the business. Yet, only one month after takeover, Plessey abandoned it.

Plessey's argument that the abandonment was undertaken in good faith misses the point. The law imposes upon one who assumes control a good faith obligation to generate profits *from the assets of the business.* Plessey was not free to simply terminate ISL's established business and strike out on some new road. The contract required ISL to operate the cable harness assembly work and to make a good faith effort to generate profits from *that work*. Plessey's discontinuance of cable harness assembly was a breach of the contract and the jury's decision to the contrary should not stand.

IV.

THE EVIDENCE ESTABLISHED THAT PLESSEY DEFRAUDED ISL (Reply to Def's. Br. pp. 71-76).

Plessey first argues that its misrepresentation was cured once the jury found that the management takeover in June was permissible. Plessey is incorrect for two reasons. First, ISL claimed that it was fraudulently induced to enter into the contract on February 4 by Plessey's false representation that ISL would be permitted to remain in management. The fraud occurred at that time. The fact that Plessey later carried out its scheme by reliance on a contract provision does not alter the fact that ISL would never had entered into the contract in the first place had it known on February 4 that Plessey intended to takeover the business. *VTR, Inc.* v. *Goodyear Tire & Rubber Co.,* 303 F.Supp. 773 (S.D. N.Y. 1969), relied on by Plessey, is a breach of contract case, not a fraud case, and the contract specifically gave defendant a right to act as it did. The contract here did not give Plessey a right to defraud ISL. Second, as discussed above, supra, pp. 15-16, the jury's finding that the takeover was not premature is contrary to all the evidence.

It is indisputable that when Kovar balked at immediate implementation of Plessey's matrix plan because of the adverse effect it would have on profitability during the measuring year,

Plessey decided to remove Kovar and takeover management of ISL *irrespective of the contract provisions.* To characterize Clarke's May memorandum (PX 20) as a contingency plan never to be put into effect if ISL made $15,000 of profit in May is to read something into the document that not only does not appear, but also is directly contradicted by the contemporaneous language of the instrument. PX 20 set out in stone Plessey's true intention, an intention which had been misrepresented at the time ISL entered into the February 4 agreement.

V.

PLESSEY IS PRECLUDED FROM APPEALING THE JURY'S VERDICT ON THE COUNTERCLAIMS AND THE JURY CORRECTLY FOUND THAT PLESSEY'S COUNTERCLAIMS WERE WITHOUT MERIT (Reply to Def's. Br. pp. 77-80).

Plessey is precluded by law from appealing the judgment on the counterclaims. Plessey's counsel never made a motion for a directed verdict, a motion for judgment n.o.v., or a motion for a new trial with respect to the counterclaims. As a result of this failure, the law is clear that this court may not enter judgment for Plessey on the counterclaims and may not order a new trial. 5A Moore, Federal Practice ¶ 50.03[2], p. 2334; 6A Moore, Federal Practice ¶ 59.15[1], p. 265. The cross appeal should be summarily dismissed.

Plessey filed counterclaims seeking damages for fraud and breach of warranties based upon (1) an alleged understatement of liabilities by $34,000 and (2) alleged overvaluation of inventory. The jury found against Plessey on its counterclaims. The evidence fully supports that finding.

First, Plessey argues with respect to the $34,000 understatement of liabilities that its witness, Jones, a Price Waterhouse accountant, testified that there was such an understatement. What Plessey fails to mention is that on cross-examination, and again on re-cross, Jones admitted that ISL's December, 1969

financial, which mistakenly understated liabilities by $34,000, also included $54,000 of accounts payable which had, in fact, been paid. The net result was a $20,000 error in favor of Plessey (Tr. p. 1265). Thus, Jones conceded, ISL's net worth was actually $20,000 greater than the statement showed (Tr. p. 1276). Obviously, the jury correctly found that there was no merit to Plessey's counterclaim regarding the $34,000 understatement.

Second, Plessey argued unsuccessfully to the jury that ISL wrongfully overvalued its inventory. Initially it should be pointed out that Jones admitted that Price Waterhouse, ISL's and Plessey's accountants, participated fully in the taking of the inventory (Tr. pp. 1260-61). Apparently two unintentional counting mistakes were made resulting in a $73,000 overvaluation. However, Price Waterhouse made those mistakes along with ISL. Moreover, as to $65,000 of the $73,000, the ISL financial statement specifically stated in a footnote that the value of the memory cores inventoried was "doubtful" and the company had "no immediate need" for these cores (DX AZ p. 4, notes 3 and 4(b)1). Albert's last minute testimony that these off-size cores were to be used in Plessey's European operations was simply disbelieved by the jury. Similarly, the jury did not credit the testimony that Plessey relied on the value of the cores when the financial statement unequivocably stated they were of no value. Nor did it find that Plessey was damaged by the remaining $8,000 overstatement in light of the $20,000 understatement of liabilities in Plessey's favor. Those questions were properly for the jury and Plessey lost.

VI.

PLESSEY WAS NOT THE PREVAILING PARTY AND THE COURT PROPERLY INVOKED THE "100 MILE RULE." (Reply to Def's. Br. pp. 81-85).

Plessey argues that it was the prevailing party because it devoted only 15 minutes of the three week trial to its counterclaims. Parenthetically, this admission establishes that those claims were interposed as a settlement and trial tactic only and were utterly without merit. Nevertheless, Plessey chose to file the counterclaims and asked for $12,000,000 damages. The case was prepared by ISL's counsel on that basis. ISL defeated all counterclaims. Plessey's contention at this late date that it was the prevailing party because, in reality, its counterclaims were frivolous should be rejected out of hand.

Similarly, Plessey's plea that this Court ignore the "100 mile rule" should be rejected. The rule is based on well-established principles of American jurisprudence which seek to encourage access to the courts by foreclosing a losing party from exposure to a huge cost bill at the close of the case. Here, Plessey could well afford to fly many witnesses from all parts of the world to New York. To require ISL, which has virtually no assets, to pay those travel expenses would be unjust.

CONCLUSION.

For the foregoing reasons, Plaintiff-Appellant, Scientific Holding Company, Ltd., respectfully prays that the District Court's direction of a verdict for defendant with respect to the validity of the March 2 Amendments be reversed, that plaintiff be awarded a new trial as to all issues on its claims, and that the jury verdict with respect to defendant's counterclaim be affirmed in all respects.

Respectfully submitted,

FRANCIS J. MCCONNELL,
RICHARD P. CAMPBELL,
135 South LaSalle Street,
Chicago, Illinois 60603,

ROBERT M. BLUM,
230 Park Avenue,
New York, New York 10017,
Attorneys for Plaintiff-Appellant,
Scientific Holding Company,
Ltd.

No. 74-1584 & 74-1636

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss. ....L. Appleton.... being first duly sworn, deposes and says that he served ....two.... copies of the ....

............Reply Brief..

in the above entitled cause, as per statute herein made and provided, on

Mr. James J. Maloney
Rogers & Wells
200 Park Avenue
New York, New York 10017

this ....12th............ day of ....September...., A. D. 1974..

....L. Appleton....

Subscribed and sworn to before me this 12th

day of ....September........, A. D. 19.74

....Leonard R. Westman....
Notary Public.